1045.

SUPREME COURT OF THE UNITED STATES.

No. 233.

CORNELIUS KANOUSE, PLAINTIFF IN ERROR,

vs.

JOHN M. MARTIN.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

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[GIDEON, Print.]

UNITED STATES OF AMERICA, *ss.*

[L. S.] The President of the United States of America, to the judges of the superior court of the city of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which was in the court of appeals of the State of New York, and has been remitted to the said court, before you, between Cornelius Kanouse, appellant, and John M. Martin, respondent, manifest error hath happened to the great damage of the said Cornelius Kanouse, as by his complaint appears; and it being fit that the error, if any hath been, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the first Monday of April next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger [B.] Taney, esquire, chief justice of the Supreme Court of the United States, this second day of January, in the year of our Lord one thousand eight hundred and fifty-two, and of the independence of the United States the seventy-sixth.

(Signed) JOHN W. NELSON,
Clerk of the circuit court of U. S.,
South. dist. of New York.
ANDREW S. GARR, *Attorney.*

(Endorsed.) April 2, 1852. Allowed.
S. NELSON.

The answer of the justices of the superior court of the city of New York in the within writ mentioned, the proceedings whereof mention is within made, with all things touching the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness Thomas J. Oakley, chief justice of the superior court of the city of New York, at the City Hall of said city, the 26th day of April, A. D. 1852.

[L. S.]

ROBERT G. CAMPBELL, *Clk.*

Pleas before the justices of the supreme court of judicature of the people of the State of New York, at the City Hall of the city of New York, of the term of May, in the year one thousand eight hundred and forty six.

Witness: GREENE C. BRONSON, *Chief justice*.
HALLETT & others, *Clerks*.

CITY AND COUNTY OF NEW YORK, *ss*.

The people of the State of New York sent to the judges of the court of common pleas for the city and county of New York their writ close in these words, to wit:

1 The people of the State of New York, to the judges of our court of common pleas for the city and county of New York, greeting:

Because in the record and proceedings, and also in the giving of judgment in a plaint which was in our said court of common pleas, before you, between John M. Martin, plaintiff, and Cornelius Kanouse, defendant, of a plea of trespass on the case upon promises, manifest error hath intervened to the great damage of the said Cornelius Kanouse, as by his complaint we are informed; we
2 being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you send to our justices of our supreme court of judicature, distinctly and openly, under your seal, the record and proceedings of the plaint aforesaid, with all things concerning the same, and this writ, so that they may have them at the City Hall, in the city of New York, on the first Monday of May next, that the record and proceedings aforesaid being inspected,
3 we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of the State of New York, ought to be done.

Witness, Greene C. Bronson, esq., our chief justice, at the Capitol, in the city of Albany, the seventeenth day of January, in the year one thousand eight hundred and forty-six.

HALLETT & OTHERS, *Clerks*.
JOSEPH WALLIS, *Attorney*.

At which day, that is to say, on the first day of May, of May term, in the year of our Lord 1846, by virtue of the said writ, the record and proceedings therein mentioned and referred to, with all things touching the same, are brought into the supreme court of judicature of the people of the State of New York, at the City Hall in the city of New York, in a certain schedule to the said writ annexed, according to the exigency of the said writ, and which said record and proceedings are as follows, that is to say:

New York common pleas.

Pleas in the court of common pleas, held at the City Hall, in and for the city and county of New York, before the judges of the same court, of August term, in the year of our Lord one thousand eight hundred and forty-five.

Witness: MICHAEL ULSHOEFFER, *First judge.*
JAMES CONNER, *Clerk.*

CITY AND COUNTY OF NEW YORK, *ss.*

John M. Martin, plaintiff in this suit, by Herman C. Westervelt, his attorney, comes here into the court of common pleas for the city and county of New York, and in and by this his declaration, filed pursuant to the statute, complains of Cornelius Kanouse, defendant in this suit, in a plea of trespass on the case upon promises.

For that whereas the said defendant, on the sixteenth day of August, in the year one thousand eight hundred and forty-five, at the city and county of New York aforesaid, and within the jurisdiction of this court, was indebted to the said plaintiff in the sum of four hundred and ninety-nine dollars, lawful money of the United States of America, for the work and labor, care, diligence, and attendance of the said plaintiff by the said plaintiff before that time done, performed, and bestowed, as the attorney, solicitor, and counsel of and for the said defendant, and upon his retainer in and about the prosecuting, defending, soliciting, and arguing of divers causes, suits, and businesses for the said defendant, and for certain fees due, and of right payable to the said plaintiff in respect thereof: and for other the work and labor, care, diligence, and attendance of the said plaintiff, before that time done, performed, and bestowed in and about the drawing, copying, and engrossing of divers conveyances, deeds, and writings, for the said defendant; and in and about other the business of the said defendant, and for the said defendant, and at his special instance and request; and also for divers journeys and other attendances by the said plaintiff before then made, performed, and given in and about other the business of the said defendant, and at his like request; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, untook, and then and there faithfully promised the said plaintiff to pay to him the said sum of money last mentioned, when he should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at his like request, done, performed, bestowed, and given other work and labor, care, diligence, and attendance, as the attorney, solicitor, and counsel of and for the said defendant, and upon his retainer in and about

the prosecuting, defending, arguing, and soliciting of divers other causes, suits, and businesses for the said defendant; and had also, at the like special instance and request of the said defendant, before that time done, performed, and bestowed other work and labor, care, diligence, and attendance, in and about the drawing, copying, and engrossing of divers other conveyances, deeds, and writings, for the said defendant, and in and about other the business
10 of the said defendant, and for the said defendant; and had also, at the like special instance and request of the said defendant, before that time made, performed, and given divers other journeys and attendances in and about other the business of the said defendant, and for the said defendant, the said defendant undertook, and then and there faithfully promised the said plaintiff, to pay him so much money as he reasonably deserved to have of the said defendant for the same, when the said defendant should be thereunto afterwards requested; and the said plaintiff avers, that he reasona-
11 bly deserved to have of the said defendant for the same, the further sum of four hundred and ninety-nine dollars, of like lawful money, to wit, at the place aforesaid, whereof the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of four hundred and ninety-nine dollars, of like lawful money, for the work and labor, care and
12 diligence, of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed in and about other the business of the said defendant, and for the said defendant, and at his like request; and also in the further sum of four hundred and ninety-nine dollars, of like lawful money, for money by the said plaintiff before that time lent and advanced to, and paid, laid out, and expended for, the said defendant, and at his like request; and for other money by the said defendant before that time had and re-
13 ceived to and for the use of the said plaintiff; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay to him the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to
14 the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to said plaintiff in the further sum of four hundred and ninety-nine dollars, of like lawful money as aforesaid; and being so found in arrear and indebted to the said

plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money 15
last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.) hath not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiff, the said defendant hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of four hundred and ninety-nine dollars; and thereof he brings suit, &c.

And it is suggested to the court now here, that the said declara- 16
tion has been duly filed with the clerk of this court, at the City Hall, in the city of New York, and that a copy of said declaration, and a notice requiring the defendant to plead thereto, according to the practice of this court, have been duly and personally served on the said defendant, at the City Hall, and within the county of New York aforesaid.

And now, at this day, that is to say, on the third Monday of March, of March term, in the year one thousand eight hundred and forty-six, to which said day the said defendant had leave to 17
imparle to the declaration aforesaid, and then to answer the same before the judges of the said court, at the City Hall, of the city of New York, come as well the said plaintiff, by his attorney aforesaid, as the said defendant. And the said defendant defends the wrong and injury, when, &c., and says nothing in bar or preclusion of the said action, but makes default therein, whereby the said plaintiff remains therein undefended against the said defendant; therefore the said plaintiff ought to recover against the said defendant the damages by occasion of the premises. But because 18
it is unknown to the said court of the people, before the aforesaid justices thereof, what damages the said plaintiff has sustained by means of the premises, the sheriff of the city and county of New York is commanded, that by the oaths of twelve good and lawful men of his bailiwick, he diligently inquire what damages the said plaintiff has sustained, as well by means of the premises, as for his costs and charges by him about his suit in that behalf expended; and that he send the inquisition which he shall thereupon take, to 19
the said court of common pleas for the city and county of New York, before the judges of the same court, at the City Hall, of the city of New York, on the seventeenth day of March then next, under his hand and the hands of those by whose oaths he should take such inquisition, together with the writ of the people to him directed thereupon. The same day was given to the said plaintiff, at the same place.

At which day, before the same judges of the court of common

pleas, for the city and county of New York, at the City Hall, of the city of New York, come the said plaintiff, by his attorney aforesaid, and the sheriff, to wit, William Jones, esquire, sheriff of the said city and county of New York, now here, returned a certain inquisition indented, taken before him, at said City Hall, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and forty-six, by the oath of twelve good and lawful men of his bailiwick, by which it is found that the said plaintiff in the said writ named, has sustained damages, by means of the matter in the said writ contained, to three hundred and ninety-eight dollars and forty-three cents, besides the costs and charges by the said plaintiff about his suit in that behalf expended, and for those costs and charges to six cents.

Therefore, it is considered that the said plaintiff do recover against the said defendant his damages as aforesaid, by the inquisition above found, and also the sum of twenty-three dollars and fourteen cents, for his said costs and charges by the said court of the people, before the aforesaid judges thereof, now here, adjudged of increase to the said plaintiff, and with his assent; which said damages, costs, and charges, in the whole, amount to four hundred and twenty-one dollars and sixty-three cents. And the said defendant, in mercy, &c.

Judgment signed this 17th day of March, mdcccxlvi.

CHAS. P. DALY, *A. J.*

Afterwards, to wit, on the first Monday of May, in this same term, before the said justices of the supreme court aforesaid, at the City Hall, in the city of New York, comes the said Cornelius Kanouse, by Joseph Wallis, his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said John M. Martin to have or maintain his aforesaid action thereof against the said Cornelius Kanouse. There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said John M. Martin, against the said Cornelius Kanouse; whereas by the law of the land the said judgment ought to have been given for the said Cornelius Kanouse, against the said John M. Martin. And the said Cornelius Kanouse prays, that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

First amendment.

And the said plaintiff, Cornelius Kanouse, by his attorney afore-

said, further says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that before the giving of the said judgment the said court of common pleas had ceased to have jurisdiction of the cause in which the said judgment was given, inasmuch as the said Cornelius Kanouse was by law entitled to remove the said cause for trial into the circuit court of the United States for the southern district of New York, and had before the rendition of the said judgment, and at the time of entering his appearance in the said court of common pleas, to wit, on the eighteenth day of September, in the year eighteen hundred and forty-five, filed a petition for such removal, and offered good and sufficient surety in the manner and form prescribed by the act of Congress, entitled "An act to establish the judicial courts of the United States;" whereupon it became the duty of the said court of common pleas to accept the surety so offered, and proceed no further in the cause.

And the said Cornelius Kanouse suggests and alleges to this court, that there are remaining in the said court of common pleas, before the judges thereof, the declaration that was originally filed in the said cause; the rule for the entry of the defendant's appearance therein; the said petition of the said Cornelius Kanouse for the removal of the cause; the affidavit of the said Cornelius Kanouse, verifying the said petition; the bond of the said Cornelius Kanouse, and his surety, Charles Wyckoff, that accompanied the said petition; the affidavit of justification of the said surety; the notice of the filing of the said petition, bond, and affidavits, and of the motion made on the part of the said Cornelius Kanouse for the removal of the cause; the affidavits and papers on the part of the said John M. Martin on the said motion; the rule or order made thereon by the said court of common pleas; the affidavits and papers, as well on the part of the said John M. Martin as on the part of the said Cornelius Kanouse, on a motion made in the term of October, one thousand eight hundred and forty-five, to amend the said declaration; the rule or order made thereon by the said court; the rule for the entry of the default of the said Cornelius Kanouse, in not pleading to the declaration; and the affidavit of the service upon the said Cornelius Kanouse of a copy of the declaration, and of notice to plead thereto; upon which affidavit the said default was entered; which said declaration, rules, orders, petition, bond, affidavits, notice, papers, and proceedings, are not certified and returned with the writ of error depending in this court; and the said Cornelius Kanouse prays a writ of certiorari to be issued to the judges of the said court of common pleas, to certify to the said justices of the supreme court of judicature the truth of the same, and it is granted to him, &c. And the said Cornelius Kanouse prays, that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing,

and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

Which said writ of certiorari, so prayed and granted, follows in these words, to wit:

The people of the State of New York, to the judges of the court of common pleas, for the city and county of New York, greeting:

We being willing, for certain causes to be certified of certain proceedings in a cause lately depending in our court, before you, between John M. Martin, plaintiff, and Cornelius Kanouse, defendant, of a plea of trespass on the case, to wit: the declaration that was originally filed in the said cause; the rule for the entry of the defendant's appearance therein; the petition of the defendant for the removal of the cause to the circuit court of the United States for the southern district of New York; the affidavit of the defendant verifying the said petition; the bond of the defendant, and his surety, Charles Wyckoff, that accompanied the said petition; the affidavit of justification of the said surety; the notice of the filing of the said petition, bond, and affidavits, and of the motion made on the part of the defendant for the removal of the cause; the affidavits and papers on the part of the plaintiff on the said motion; the rule or order made thereon; the affidavits and papers, as well on the part of the plaintiff as on the part of the defendant, on a motion made in the term of October, one thousand eight hundred and forty-five, to amend the said declaration; the rule or order made thereon; the rule for the entry of the default of the defendant in not pleading to the declaration, and the affidavit of the service upon the defendant of a copy of the declaration, and of notice to plead thereto; upon which affidavits said default was entered; do command you, that having searched the files, entries, memorandums, and other remembrances of the rules of, and proceedings in, the said court of common pleas for the city and county of New York, being in your custody of record, what you shall find therein concerning the said declaration, rules, orders, petition, bond, affidavits, notice, papers, and proceedings, or any or either of them, you certify to our justices of our supreme court of judicature, without delay, at the court-house, in the city of Rochester, fully and entirely, as the same remain in your custody, together with this writ.

Witness Greene C. Bronson, esquire, our chief justice, at the court-house, in the city of Rochester, the third Monday of October, in the year one thousand eight hundred and forty-six.

HALLETT and others, *Clerks*.

JOSEPH WALLIS,
Att'y for Cornelius Kanouse.

We, the judges of the court of common pleas, for the city and county of New York, having searched and examined the files, entries, and records of our said court, do find there remaining on

file of record, a certain original declaration, filed in the cause of John M. Martin, plaintiff, and Cornelius Kanouse, defendant; the entry of the defendant's appearance therein; the petition of the defendant for the removal of said cause to the circuit court of the United States for the southern district of New York; the affidavit 36
of the defendant, verifying said petition; the bond of the defendant accompanying said petition; the affidavit of justification of surety; the notice of the filing of the said petition, bond, and affidavits, and of the motion made on the part of defendant for the removal of said cause; the affidavits and papers on the part of the plaintiff on the said motion; the rule made thereon; the affidavits and papers as well on the part of the plaintiff as on the part of the defendant, on motion made to amend the declaration in said cause; 37
the rule made and entered thereon; the affidavit of service upon the defendant of a copy of the declaration, and of notice to plead thereto; the rule for the entry of the default of the defendant for not pleading; in the words and figures following, to wit:

New York common pleas, of August term, in the year of our Lord one thousand eight hundred and forty-five.

City and county of New York, ss.

John M. Martin, plaintiff in this suit, by Harman C. Westervelt, his attorney, comes here into the court of common pleas for the city and county of New York, and in and by this his declara- 83
tion, filed pursuant to the statute, complains of Cornelius Kanouse, defendant in this suit, in a plea of trespass on the case on promises.

For that whereas the said defendant, on the sixteenth day of August, in the year one thousand eight hundred and forty-five, at the city and county of New York aforesaid, and within the jurisdiction of this court, indebted to the said plaintiff in the sum of one thousand dollars, lawful money of the United States of America, for the work and labor, care, diligence, and attendance of the 39
said plaintiff, by the said plaintiff before that time done, performed, and bestowed, as the attorney, solicitor, and counsel of and for the said defendant, and upon his retainer in and about the prosecuting, defending, soliciting, and arguing of divers causes, suits, and businesses for the said defendant, and for certain fees due and of right payable to the said plaintiff in respect thereof; and for other the work and labor, care, diligence, and attendance of the said plaintiff before that time done, performed, and bestowed, in and about the drawing, copying, and engrossing of divers conveyances, deeds, 40
and writings for the said defendant, and in and about other the business of the said defendant, and for the said defendant, and at his special instance and request; and also for divers journeys and other attendances by the said plaintiff before then made, performed, and given, in and about other the business of the said defendant, and at his like request. And being so indebted, the said defen-

dant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and
41 there faithfully promised the said plaintiff to pay to him the said sum of money last mentioned, when he should be thereunto afterwards requested. And whereas also the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had, before that time, at his like request, done, performed, bestowed, and given other work and labor, care, diligence, and attendance, as the attorney, solicitor, and counsel of and for the said defendant, and upon his retainer, in and about the prosecuting, defending, arguing, and soliciting of divers other causes, suits, and businesses for the said
42 defendant, and had also, at the like special instance and request of the said defendant, before that time done, performed and bestowed, other work and labor, care, diligence, and attendance, in and about the drawing, copying, and engrossing of divers other conveyances, deeds, and writings for the said defendant, and in and about other the business of the said defendant, and for the said defendant; and had also, at the like special instance and request of the said defendant, before that time made, performed and given, divers other journeys and attendances, in and about other
43 the business of the said defendant, and for the said defendant, the said defendant undertook, and then and there faithfully promised the said plaintiff, to pay him so much money as he reasonably deserved to have of the said defendant for the same, when the said defendant should be thereunto afterwards requested; and the said plaintiff avers, that he reasonably deserved to have of the said defendant, for the same, the further sum of one thousand dollars, of like lawful money, to wit, at the place aforesaid, whereof the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And
44 whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of one thousand dollars, of like lawful money, for the work and labor, care and diligence, of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed in and about other the business of the said defendant, and for the said defendant, and at his like request; and also in the further sum of one thousand dollars, of like lawful money,
45 for money by the said plaintiff before that time lent and advanced to, and paid, laid out, and expended for, the said defendant, and at his like request; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay to him the said several sums of money in this count mentioned, when the said defendant should

be thereunto afterwards requested. And whereas also the said 46
defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of one thousand dollars, of like lawful money as aforesaid; and being so found in 47
arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.) hath not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, 48
but to pay the same, or any part thereof, to the said plaintiff, the said defendant hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of one thousand dollars; and thereof he brings suit, &c.

HN. C. WESTERVELT,
Attorney for plaintiff.

(Endorsed,) John M. Martin against Cornelius Kanouse. Narr., filed pursuant to statute. H. C. Westervelt, plaintiff's attorney. Filed 6th September, 1845.

CORNELIUS KANOUSE ads. JOHN M. MARTIN. } September 18, 1845.

A. S. GARR, *Attorney.*

On motion of Mr. Garr, attorney for defendant, ordered, that his appearance in this suit be, and the same is hereby, entered.

Court of common pleas for the city and county of New York. 49

In trespass on the case upon promises.

CORNELIUS KANOUSE ads. JOHN M. MARTIN. }

To the honorable the judges of the court of common pleas for the city and county of New York.

The petition of Cornelius Kanouse, the defendant in the above entitled cause, respectfully showeth:

That he is sued in the action above mentioned, in which the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs; that the said action was commenced by declaration, which was served on your petitioner on the fifteenth day of September instant, and is the only process against him therein; that the above named plaintiff is and at the time of the commencement of this suit was, a citizen and inhabitant of the State of New York; and that your petitioner is, and at the time of the commencement of this suit was, a citizen and inhabitant of the State of New Jersey; that your petitioner is desirous to remove the said cause for trial into the next circuit court of the United States, to be holden in and for the southern district of New York, and offers good and sufficient surety for his entering, in the said circuit court, on the first day of its session, copies of said process against him. And also for his there appearing in the cause, agreeably to the act, entitled "an act to establish the judicial courts of the United States." He therefore prays this honorable court that the said surety may be accepted, and that the said cause may be removed to the said circuit court of the United States accordingly.

CITY AND COUNTY OF NEW YORK, *ss.*

The above named Cornelius Kanouse, being duly sworn, saith, that the matters stated in the foregoing petition are true.

CORNELIUS KANOUSE.

Sworn, this seventeenth day of September, 1845, before me—

H. C. TONNER,
Commissioner of deeds.

Know all men by these presents, that we, Cornelius Kanouse, of Jersey City, in the county of Hudson, and State of New Jersey, and Charles Wyckoff, of the city and county of New York, in the State of New York, hotel keeper, are held and firmly bound unto John M. Martin, in the penal sum of one thousand dollars, lawful money of the United States of America, to be paid unto the said John M. Martin, or to his certain attorney, executors, administrators, or assigns; to which payment, to be well and truly made, we bind ourselves, jointly and severally, our and each of heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this seventeenth day of September, one thousand eight hundred and forty-five.

The condition of this obligation is such, that if the said Cornelius Kanouse shall, on the first day of the next term of the circuit court of the United States, to be held in and for the southern district of New York, enter in the said court copies of the process against him in the court of common pleas for the city and county of New York, at the suit of John M. Martin, of a plea of tress-

pass on the case upon promises, and shall also there appear in the said cause, agreeably to the act entitled "an act to establish the judicial courts of the United States," then the before written obligation to be void, but otherwise to be and remain in full force and virtue.

CORNELIUS KANOUSE, [L. S.]
CHARLES WYCKOFF. [L. S.]

Sealed and delivered in presence of—
H. C. TONNER,
J. D. MILLER, Jersey City.

Court of common pleas for the city and county of New York. 55

CORNELIUS KANOUSE, ads. JOHN M. MARTIN.

CITY AND COUNTY OF NEW YORK, *ss.*

Charles Wyckoff, of the city and county of New York, in the State of New York, hotel keeper, maketh oath and saith, that he is a householder in the city of New York, and is worth the sum of two thousand dollars, over and above what will pay all his debts.

CHARLES WYCKHOFF.

Sworn this seventeenth day of Sept., 1845, before me—
H. C. TONNER,
Commissioner of deeds.

(Endorsed:) Common pleas, Cornelius Canouse, at the suit 56
of John M. Martin, petition, bond &c., for removal of cause to the circuit court of the United States.

A. S. GARR,
Attorney for defendant.

New York common pleas.

CORNELIUS KANOUSE, ads. JOHN M. MARTIN.

SIR: Please to take notice, that the appearance of the defendant in the above entitled cause has this day been entered in the book of common rules, kept at the office of the clerk of this court, and that at the same time the original petition, bond, and affidavits, copies whereof are herewith delivered to you, were filed in the 57
said office. Please further to take notice, that on the said petition, bond, and affidavits, I shall move judges of this court, or some or one of them, at chambers, on the twenty-second day of September, instant, at ten o'clock in the forenoon, that the surety

offered in and by the said petition be accepted, and that this court proceed no further in this cause, but that the same be removed to the circuit court of the United States, for the southern district of
58 New York; or for such other rule or order as the said judges, or some or one of them, shall see fit to make in the premises.

Dated September eighteenth, one thousand eight hundred and forty-five.

Yours, &c.,

A. S. GARR,
Attorney for defendant.

To HERMAN C. WESTERVELT, esq.,
Attorney for plaintiff.

CITY AND COUNTY OF NEW YORK, *ss.*

Andrew S. Garr, attorney for the defendant in the above entitled cause, being duly affirmed, saith, that on the eighteenth day of September instant, he served a notice of which the foregoing is a copy, together with a copy of the petition, bond, and affidavits in
59 the said notice referred to, upon Herman C. Westervelt, esq., the attorney for the plaintiff, by delivering the same to a clerk in Mr. Westervelt's office.

ANDREW S. GARR.

Affirmed this 22d day of September, 1845.

(Endorsed:) Common pleas, Cornelius Kanouse ads. John M. Martin. Notice of motion for removal of cause to the circuit court of the United States.

A. S. GARR, *Attorney*.

Affidavit.

New York common pleas.

JOHN M. MARTIN
vs.
CORNELIUS KANOUSE.

STATE OF NEW YORK,
City and county of New York, ss.

John M. Martin, the plaintiff in the above entitled cause, being
60 duly sworn, says, that he is an attorney of the supreme court of the State of New York, and of the court of common pleas for the city and county of New York, and a solicitor of the court of chancery of said State; and that the above suit was instituted to recover costs, fees, and compensation for professional services rendered by this deponent, and for disbursements paid by him, in prosecuting and defending causes as attorney, solicitor, and counsel in this court and in the courts of chancery and errors of the State, in
61 which the above named defendant was or is a party, and at the request and on the retainer of the said defendant.

And this deponent further says, that the amount of damages mentioned at the foot of the declaration in this cause, is not the actual amount due to this deponent, as plaintiff in said cause, nor does it show the amount he seeks or expects to recover therein; and that the whole of said amount really due deponent, and so sought to be recovered, is less than five hundred dollars.

And this deponent further says, that he has never in this suit demanded from said defendant, except by said declaration, a sum 62
amounting to five hundred dollars, and that he is now ready and willing, and hereby offers, to settle and discontinue this suit on payment to him of a sum less than five hundred dollars, and to give the said defendant on such payment a full discharge of and from all claims and demands which this deponent, as plaintiff in this suit, has made, or can or may recover against the said defendant therein. And further this deponent says not.

Sworn before me, this day of September, 1845.

Affidavit.

New York common pleas.

JOHN M. MARTIN
vs.
CORNELIUS KANOUSE.

STATE OF NEW YORK, 63
City and county of New York, ss.

John M. Martin, the plaintiff in the above entitled cause, being duly sworn, says, that he is an attorney of the supreme court of the State of New York, and of the court of common pleas for the city and county of New York, and a solicitor of the court of chancery of said State; and that the above suit was instituted to recover costs, fees, and compensation for professional services rendered by this deponent, and for disbursements paid by him in prosecuting 64
and defending causes as attorney and counsel in this court and the supreme court and court of errors of this State, and as solicitor and counsel of the said court of chancery, in which the above named defendant was or is a party, and at the request and on the retainer of the said defendant.

And this deponent further says, that the amount of damages mentioned at the foot of the declaration in this cause is not the actual amount due to this deponent as a plaintiff in said cause, nor does it show the amount he seeks or expects to recover therein; and the whole of said amount really due deponent, and so sought 65
to be recovered, is less than five hundred dollars.

And this deponent further says, that he has never in this suit demanded from said defendant, except by said declaration, a sum amounting to five hundred dollars, and that he is now ready and

willing, and hereby offers, to settle and discontinue this suit on payment to him of a sum less than five hundred dollars, and to give the said defendant, on such payment, a full discharge of and from
66 all claims and demands which this deponent, as plaintiff in this suit, has made or can or may recover against the said defendant; and that the whole amount of this deponent's claim, including all charges against the said defendant in this suit, is four hundred and ninety-nine dollars and fifty-six cents; and that the matter in dispute in said cause, and claimed by this deponent, does not exceed the sum last mentioned; that said sum is made up of various items of an account against said defendant, and that considerable pay-
67 ments have been made on the same by said defendant, from time to time, which, if insisted on by way of reduction thereof, will considerably reduce the sum aforesaid.

JOHN M. MART'IN.

Sworn this 1st day of October, 1845, before me,
CHARLES P. DALY, *A. J.*

(Endorsed:) Adj'd to October 4, 1845, at 10, a. m.
C. P. D.

Motion denied with $7 costs of opposing.
Filed 6th October, 1845.

New York common pleas.

CORNELIUS KANOUSE
ads.
JOHN M. MARTIN.

On filing petition, affidavit, &c., and on defendant's motion to
68 remove this cause into the circuit court of the United States, for the southern district of New York, counsel for the respective parties having been heard thereon, and this court being satisfied that the actual amount in controversy herein is less than five hundred dollars:

Ordered, that said motion be, and the same is hereby, denied.
Dated New York, October 4, 1845.

CHARLES P. DALY, *A. J.*

Affidavit of John M. Martin.

New York common pleas.

JOHN M. MARTIN
vs.
CORNELIUS KANOUSE.

CITY AND COUNTY OF NEW YORK, *ss.*

John M. Martin, the plaintiff in this cause, being duly sworn,
69 says, that it appears from the register in which memoranda, of the

1057.

proceedings of said cause are made, which this deponent believes 69
correct; that the declaration in said cause was personally served on the defendant therein on the fifteenth day of September last; that on the eighteenth day of said September, the plaintiff's attorney received a notice of appearance, and of a motion to remove said cause from this court to the circuit court of the United States, for the southern district of New York, from Andrew S. Garr, esquire, as the attorney of said defendant; that said motion of said defendant was denied, and an order or rule made on the denial of said motion, and a copy served on said defendant's attorney; of 70
which said rule or order, that hereunto annexed, and marked A, is also a copy.

And this deponent further says, that on the sixth day of October, instant, a further order was made in said cause, staying all proceedings therein, and served on this deponent, or his attorney, in said cause, of which that hereunto annexed, marked B, is a copy.

And this deponent further says, that neither this deponent, nor his attorney, in said cause, has received any notice of any further proceedings in said cause on the part of said plaintiff, nor does 71
this deponent believe any further proceedings have been taken in said cause by said defendant.

And this deponent further says, that the paper hereunto annexed, and marked C, is a copy of the plaintiff's declaration in said cause, and of the notice to plead thereto, served on said defendant therein; and further, that the amount in controversy in said cause is not one thousand dollars, as stated at the foot of said declaration, but that the true amount actually involved in such controversy is less than five hundred dollars; and further this deponent says not.

JOHN M. MARTIN. 72

Sworn this twenty-second day of October, 1845, before me.

D. P. INGRAHAM, *A. J. C. P.*

A.

New York common pleas, October 6th, 1845.

CORNELIUS KANOUSE
ads.
John M. Martin.

On filing petition, affidavit, &c., and on defendant's motion to remove this cause into the circuit court of the United States for the southern district of New York, counsel for the respective parties having been heard thereon, and this court being satisfied that the actual amount in controversy therein is less than five hundred dollars; ordered that said motion be, and the same is hereby, denied.

(A copy.) ANDREW WARNER, *Clerk*. 73

B.

Common pleas.

CORNELIUS KANOUSE
ads.
John M. Martin.

Let all proceedings in this cause on the part of the plaintiff be stayed, until the defendant shall have had an opportunity to move the supreme court for a writ of mandamus, requiring this court to grant the petition of the defendant for the removal of this cause to the circuit court of the United States.

Dated, October 6, 1845.

(Signed) CHARLES P. DALY, *A. J.*

New York common pleas. Order.

JOHN M. MARTIN
vs.
Cornelius Kanouse.

74 On the annexed affidavits and papers, let the defendant or his attorney show cause, before Charles P. Daly, esq., one of the judges of this court, at their chambers in the City Hall of the city of New York, on the twenty-fifth day of October instant, at 11, a. m., why the order heretofore made in this cause, staying the plaintiff's proceedings therein, should not be set aside, or so modified as shall be just, and why said plaintiff should not be permitted to amend the declaration in said cause, by striking out the words "one thousand" wherever they occur in said declaration,
75 and substituting therefor the words "four hundred and ninety-nine," and why such further or such other order should not be made in the premises as shall be just.

Dated, New York, October 22, 1845.

D. P. INGRAHAM, *A. J.*

Court of common pleas for the city and county of New York.

CORNELIUS KANOUSE
ads.
John M. Martin.

CITY AND COUNTY OF NEW YORK, *ss.*

Andrew S. Garr, attorney and of counsel for the defendant, being duly affirmed, saith, that he verily believes that the rule or order made in this cause, on the sixth day of October instant,
76 denying the defendant's petition to remove the same to the circuit court of the United States, was made under a mistake of the law, and is erroneous, and that this court has now no jurisdiction in the said cause.

That when the said rule was made, it was and still is the intention of this affirmant to apply to the supreme court of this State, at the very first opportunity, for a writ of mandamus, requiring this court to grant the said petition; and he therefore applied for and obtained, and served an order on his honor, Judge Daly, dated on the said sixth day of October, staying all proceedings on 77
the part of the plaintiff, until the defendant shall have had an opportunity to make such motion. That by the rules and practice of the supreme court, as this affirmant understands them, and believes, such motion can be made only at a special term. That no special term has been held since the granting of the said order, and that it was and is the intention of this affirmant to make the motion at the very first special term of said supreme court.

ANDREW S. GARR.

Affirmed, this twenty-fourth day of October, eighteen hundred and forty-five, before me.

CHARLES P. DALY, *A. J.* 78

New York common pleas.

JOHN M. MARTIN
vs.
Cornelius Kanouse.

On reading and filing affidavit, and on hearing counsel for the respective parties, ordered that the plaintiff's motion for leave to amend his declaration in this cause be granted, on paying the defendant or his attorney seven dollars costs of opposing said motion, and that the order staying proceedings in said cause be modified only so far as to permit such amendment, and service of a copy of the amended declaration, with notice to plead thereto.

CHAS. P. DALY, *A. J.* 79

Enter this rule.

(Endorsed:) Common Pleas. John M. Martin against Cornelius Kanouse. Hon. C. Westervelt, attorney for plaintiff. Filed 12 Nov., 1845. Application to set aside order denied, and plaintiff permitted to amend, on payment of $7 costs of opposing motion.

New York common pleas. Affid't, service of narr.

JOHN M. MARTIN
vs.
Cornelius Kanouse.

CITY AND COUNTY OF NEW YORK, *ss.*

Anthony H. Ryder, a student at law, being duly sworn, deposes and says, that on the fifteenth day of September, 1845, this depo-

80 nent served a copy of the declaration filed in this cause, on which said copy declaration was endorsed a notice requiring the defendant to plead to said declaration in ten days after service thereof on the said defendant, Cornelius Kanouse, by delivering the same to the said Kanouse personally; and further this deponent says not.

A. H. RYDER.

Sworn before me, this 2d day of March, 1846.

WM. L. MORRIS,
Comm'r of Deeds, &c.

JOHN M. MARTIN
vs.
Cornelius Kanouse.

HN. C. Westervelt, plaintiff's attorney. March 6, 1846.

On reading and filing due proof of personal service of a copy of
81 the declaration filed in this cause, and a notice to plead thereto in ten days after such service on the defendant therein; and more than ten days having since elapsed, on motion of Hn. C. Westervelt, plaintiff's attorney, ordered that the plaintiff's default in not pleading be, and the same is hereby, entered; and, on like motion, ordered interlocutory judgment, and that a writ of inquiry issue.

(Endorsed:) Common pleas. John M. Martin vs. Corn's Kanouse. Certified copy of affidavit of service of declaration, &c., and of rule for default. March 6, 1846.

Whereupon a day is given the said John M. Martin to join in error to the said general assignment of errors, and also to plead to the said special assignment of errors of the said Cornelius Kanouse, until the third Monday of October next, before the aforesaid justices of the court-house, in the city of Rochester; the same day is given to the said Cornelius Kanouse there, &c.

And hereupon, afterwards, to wit, on the third Monday of October, in October term, in the year one thousand eight hundred
82 and forty-six, the said John M. Martin, by Harris Scovell, his attorney, freely comes here into court and says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the said supreme court of judicature, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

And as to the said special assignment of errors and allegation of diminution, and the matters therein for error assigned, the said
83 John M. Martin afterwards, to wit, on the third Monday of October, in the year one thousand eight hundred and forty-six, by Harris Scovell, his attorney, comes voluntarily into court here, and

says, that the said judgment ought not to be revoked, annulled, or held for nought, by reason of the alleged appearance and filing of the petition of the said Cornelius Kanouse in said court of common pleas, or of any other matter or thing assigned for error in said special assignment of errors and allegation of diminution, because he says that the said alleged appearance of the said Cornelius Ka- 84
nouse in said cause, in said court of common pleas, and the rule for the entry thereof, were unlawfully entered therein by one Andrew S. Garr, as the attorney-at-law of the said Cornelius Kanouse, in the said court in which said judgment was given, while he, the said Andrew S. Garr, was an inhabitant and resident of the State of New Jersey, and not legally authorized to appear in said court, and enter the said rule, as attorney for him, the said Cornelius Kanouse. And this the said John M. Martin is ready to verify, &c.; wherefore he prays that the said judgment may be in all things affirmed, &c. 85

And as to the said plea of the said John M. Martin, by him above pleaded to the said special assignment of errors, the said Cornelius Kanouse says, that by reason of any thing by the said John M. Martin, in the said plea above alleged, the said judgment ought not to be affirmed, because he, the said Cornelius Kanouse, says, that before and at the time of his said appearance in said cause in said court of common pleas, and the entering of the rule for the entry of such appearance, the said Andrew S. Garr was a prac- 86
tising and duly admitted attorney of the said court, renting and occupying a tenement in the city of New York, as an office, and personally attending in the said office and in the said court to the transaction of business as such attorney, and professed and appeared to be, and was reputed and considered to be, one of the attorneys of the said court, legally authorized to appear therein and act as such; and that the said Andrew S. Garr was recognised and treated as such in the said cause by the said court and by the 87
said John M. Martin. And this the said Cornelius Kanouse is ready to verify; wherefore, as before, he prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

And as to the said replication of the said Cornelius Kanouse, by him above pleaded to the said plea to the said special assignment of errors, the said John M. Martin says, that although the said Andrew S. Garr had been duly admitted as an attorney of the 88
said court of common pleas, before and at the time of the alleged appearance of the said Cornelius Kanouse, and the entry of the said rule therefor, and was then practising in said court as an attorney thereof, yet the said judgment ought not to be revoked, annulled, or held for naught by reason thereof, or of any matter or thing in that replication alleged; because, he says, that at the time of the alleged appearance of the said Cornelius Kanouse in said

court of common pleas, and of the entry of the rule for such appearance by the said Andrew S. Garr, as the attorney at law of him, the said Cornelius Kanouse, in said court, the said Andrew S. Garr had ceased to be, and was not an inhabitant of the State of New York. And this he, the said John M. Martin, is ready to verify; wherefore, as before, he prays that the said judgment may be in all things confirmed, &c.

And as to the said rejoinder of the said John M. Martin to the said replication of the said Cornelius Kanouse to the said plea of the said John M. Martin, by him above pleaded to the said special assignment of errors, the said Cornelius Kanouse says, that by reason of any thing by the said John M. Martin in his said rejoinder above alleged, the said judgment ought not to be affirmed, because, protesting that at the time of his said appearance in said cause, in said court of common pleas, and of the entry of the rule for such appearance by the said Andrew S. Garr, as the attorney at law of him the said Cornelius Kanouse in said court, the said Andrew S. Garr was legally authorized to appear in said court, and enter the said rule as such attorney; for sur-rejoinder, nevertheless, in this behalf, he, the said Cornelius Kanouse, says, that before and at the said time, he, the said Cornelius Kanouse, was a citizen, inhabitant, and resident of the State of New Jersey, and not a citizen, inhabitant, or resident of this State; and that he was wholly ignorant that the said Andrew S. Garr was not legally authorized to appear in said court and enter the said rule as attorney for him, the said Cornelius Kanouse. And this the said Cornelius is ready to verify; wherefore, as before, he prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

And the said John M. Martin, defendant in error, comes and says, that the said sur-rejoinder of the said Cornelius Kanouse to the said rejoinder of him, the said John M. Martin, and the matters therein contained, in manner and form as the same are above pleaded and set forth, is insufficient in law to reverse or annul the said judgment, and that he, the said John M. Martin, is not bound by the law of the land to answer the same. And this he, the said John M. Martin, is ready to verify; wherefore, for want of a sufficient sur-rejoinder in this behalf, he, the said John M. Martin, prays that the said judgment may be affirmed, &c.

And the said John M. Martin, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said sur-rejoinder, that is to say:

First. That the said Cornelius Kanouse has not, in and by his said sur-rejoinder, traversed or denied, or confessed and avoided, or in any manner put in issue the matters of fact alleged by the said John M. Martin in his rejoinder.

Second. That the said sur-rejoinder is no answer to the matters contained in the said rejoinder.

Third. That the said Cornelius Kanouse has in and by his said sur-rejoinder attempted to put in issue two facts, the one of them, to wit, the citizenship, &c., of the said Cornelius Kanouse, being wholly immaterial, and the other, to wit, the said Kanouse's ignorance as to Andrew S. Garr's legal qualifications, equally immaterial, and not properly triable by a jury. 95

Fourth. That the said Cornelius Kanouse, by his said sur-rejoinder, should, and ought to have traversed the allegation that the said Andrew S. Garr had ceased to be, and was not an inhabitant of the State of New York, contained in the said rejoinder, and should have tendered issue thereon or demurred thereto.

Fifth. That the said sur-rejoinder is insufficient, and no material issue can be taken thereon, and that it is also, in other respects, 96 defective, &c.

And the said Cornelius Kanouse says, that his said sur-rejoinder is sufficient in law.

And because the said court, before the aforesaid justices thereof, now here, are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, before the justices of the supreme court, at the City Hall, in the city of New York, until the first Monday of February, of the term of February, in the year one thousand eight hundred and fifty, to hear judgment thereon, for that the said court now here are not yet advised thereof, &c.

At which day came the parties aforesaid, by their respective attorneys; whereupon, the justices of the supreme court transfer the said writ of error, and all proceedings thereunder, to the superior court of the city of New York, to be heard and determined by the justices of the said superior court, pursuant to the act in such case made and provided. Therefore, the process thereof is continued between the parties aforesaid, of the plea aforesaid, before the justices of the said superior court, until the first Monday of March, one thousand eight hundred and fifty, at the City Hall, in the city of New York.

The same day is given to the parties here, &c., at which said last mentioned day, before the said justices of the said superior court, at a general term thereof, at the place last aforesaid, came the parties aforesaid, by their respective attorneys; and because the said superior court, before the said justices thereof, now here, are not yet advised what judgment to give of and upon the premises, therefore the process thereof is continued until the first Monday of May, in the term of May, in the year of our Lord one thousand eight hundred and fifty, at the City Hall, in the city of New York; and the same day is given to the parties aforesaid to hear judgment of the said court thereupon.

At which said last mentioned day, before the said justices of the said superior court, came the parties aforesaid, by their respective attorneys; whereupon, as well the record and proceedings aforesaid, and the judg-

ment given in form aforesaid, as the matters aforesaid by the said Cornelius Kanouse above for error assigned, being seen, and by the said superior court, before the justices thereof, now here, fully understood, and mature deliberation thereupon had, it appearing that there are no errors in the record of the judgment of the said court of common pleas, which, by virtue of the writ of error aforesaid, has been transmitted to this court; and that the matter which the plaintiff in error has specially assigned for error is contrary to the record aforesaid, and that the proceedings and papers which have been brought into this court by the writ of certiorari aforesaid, cannot, therefore, according to the laws of this State, be taken into consideration by this court; and that the said plaintiff in error, by omitting to plead to the declaration of the said defendant in error, in the said court of common pleas, and by suffering a judgment to be rendered against him by this default, has precluded himself from excepting in this court to the jurisdiction of the said court of common pleas: Therefore, it is considered, that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and stand in full force and effect; the several matters above assigned for error in any wise notwithstanding.

And it is further considered, that the said John M. Martin do recover against the said Cornelius Kanouse, as well his damages aforesaid, as also three hundred and seventy dollars and eighteen cents, adjudged to him by the superior court of the city of New York, before the aforesaid justices thereof, now here, according to the form of the statute in such case made and provided, for his damages, costs and charges, which he hath sustained and expended, by reason of the delay of the execution of the judgment affirmed on pretence of the prosecution of the said writ of error; which said damages, costs and charges, in the whole, amount to seven hundred and ninety-one dollars and eighty-one cents; and that the said John M. Martin have execution therefor, &c.; and the said Cornelius Kanouse, in mercy, &c.

Judgment signed this 8th day of June, one thousand eight hundred and fifty. WILLIAM W. CAMPBELL.

At a general term of the superior court of the city of New York, held at the city of New York, on the twenty-fifth day of May, of May term, one thousand eight hundred and fifty; present, Justices Duer, Mason, and Campbell.

JOHN M. MARTIN, defendant in error, adsm.
CORNELIUS KANOUSE, plaintiff in error.

On hearing counsel for the plaintiff in error, and the defendant in error, in person, on the argument of the writ of error, and the several matters assigned for error by the plaintiff, in his general assignment of errors therein; and on motion of Harris Scovell, esq., attorney for the defendant in error, ordered, that the judgment of the court below be affirmed, with costs.

At a general term of the superior court of the city of New York, held at the City Hall, in said city, on the fifteenth day of June, one thousand eight hundred and fifty; present, Justices Duer, Mason, and Campbell.

CORNELIUS KANOUSE, plaintiff in error,
vs.
JOHN M. MARTIN, defendant in error.

Order amending record.

On hearing counsel for the respective parties in this cause, it is ordered, that the judgment record of affirmance on file in this cause be amended, by adding the words and figures contained in the paper hereto annexed, and marked, "First amendment" to said record, immediately after the copy of the defendant's joinder in error, contained in said record; and also by striking out of said record the words, "that there is no error either in the record or proceedings aforesaid, or in giving the judgment aforesaid," and substituting therefor the words contained in the paper hereto annexed and marked, "Second amendment," and that said amendment be annexed to, and filed with said record as part thereof, together with this order; and it is further ordered, that the costs of this motion abide the event of this suit.

JOHN L. MASON.

At a special term of the superior court, at the city of New York, held at the City Hall, in the said city, on the fifth day of February, 1852.

Present, honorable Lewis H. Sandford, one of the justices of this court.

CORNELIUS KANOUSE, plaintiff in error,
against
JOHN M. MARTIN, defendant in error.

This cause having been removed into the court of appeals, by the plaintiff in error therein, on an appeal to said court from a judgment in said cause, entered in this court on the eighth day of June, 1850, and from an order of this court made in said cause on the 25th day of May, in said year, which said appeal was perfected on the 22d day of October, 1850; and the said appeal having been submitted to the said court of appeals on printed arguments and points, and said appeal, on due deliberation thereon, having been dismissed with costs by said court of appeals; and the notice of said appeal and return thereto, and the judgment of the said court of appeals thereon, having been remitted to this court before the justices thereof, according to the statute in such case made and provided, to be enforced according to law, which notice, return, and judgment now remain of record in this court, and are hereto annexed. And it appearing to this court that the costs and disbursements adjudged to the defendant in error, as respondent on said appeal,

by the said court of appeals have been duly registered, and amount to one hundred and twenty-four dollars and eighty-two cents; therefore, it is ordered and adjudged by this court, that the said defendant in error have execution for said costs and disbursements, to be issued out of this court according to law, in such case made and provided.

Dated New York, February 5th, 1852.

D. R. FLOYD JONES, *Clerk*.

STATE OF NEW YORK, *ss*.

Pleas in the court of appeals, held at the Capitol, in the city of Albany, on the thirty-first day of December, in the year of our Lord one thousand eight hundred and fifty-one, before the judges of said court. Witness, Charles H. Ruggles, esquire, chief judge; Charles S. Benton, clerk.

[SEAL.]

JOHN M. MARTIN, respondent,
against
CORNELIUS KANOUSE, appellant.

Be it remembered, that on the second day of November, in the year of our Lord one thousand eight hundred and fifty, the appellant in this cause came here into the court of appeals, by A. S. Garr, his attorney, and filed in the said court his notice of appeal and return thereto from a judgment of the superior court. And the respondent in said cause afterwards appeared in said court of appeals, by Harris Scoville, his attorney and counsel, which said notice of appeal and the return thereto filed as aforesaid, is hereunto annexed; whereupon this cause having been submitted to the court upon printed arguments and points, and due deliberation having been thereupon had, it was ordered and adjudged that the appeal in this cause be dismissed with costs; it was also ordered that the record and proceedings be remitted to the superior court, there to be proceeded upon according to law; therefore it is consided that the said appeal be dismissed with costs as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the superior court of the city of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said superior court before the justices thereof, &c.

CH. S. BENTON, *Clerk*.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, January 29, 1852.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the court of appeals, with the papers originally filed therein attached.

CH. S. BENTON, *Clerk*.

CLERK'S OFFICE, SUPERIOR COURT,
Of the city of New York.

I, D. R. Floyd Jones, clerk of the superior court of the city of New York, do hereby certify, that the following are true copies of the notice of appeal, order of May 25, 1850, judgment, record as amended, and the order of this court amending said record, and of the whole of said originals on file in my office.

In witness whereof I have hereunto subscribed my name, affixed the seal of said court, this 31st day of October, 1850.

[SEAL.]

D. R. FLOYD JONES, *Clerk.*

SUPERIOR COURT OF THE CITY OF NEW YORK.

CORNELIUS KANOUSE, plaintiff in error,
against
JOHN W. MARTIN, defendant in error.

SIRS: Please to take notice that the plaintiff in error, Cornelius Kanouse, appeals to the court of appeals from the judgment of affirmance, rendered at a general term of this court, held at the city of New York, in the month of May, in the present year, and entered in the office of the clerk of this court, on the 8th day of June, 1850, and that on the argument of said appeal, the court will be asked to review the order in this cause made in general term, on the 25th day of May, 1850.

Dated New York, October 22d, 1850.

AND'W S. GARR,
Attorney for the appellant.

To D. R. FLOYD JONES, *Clerk*,
And to HARRIS SCOVILLE, esquire,
Attorney for the above named defendant in error.

UNITED STATES OF AMERICA, *ss.*

To John M. Martin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in April instant, pursuant to a writ of error, filed in the clerk's office of the superior court of the city of New York, wherein Cornelius Kanouse is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment of the said court of appeals in the State of New York, in the said writ of error mentioned, should not be corrected and speedy justice done to the parties in that behalf.

Witness the honorable Samuel Nelson, one of the justices of the Supreme Court of the United States, at the city of New York, in the southern district of New York, this second day of April, in the year of our Lord one thousand eight hundred and fifty-two.

(Signed) S. NELSON,
AND'W S. GARR,
Attorney for plaintiff in error.

I acknowledge the service upon me of a copy of the foregoing citation, this 9th day of April, 1852.

(Signed) JOHN M. MARTIN.

Supreme Court of the United States, of the term of April, in year of our Lord one thousand eight hundred and fifty-two.

CORNELIUS KANOUSE
vs.
JOHN M. MARTIN. } (In error.)

Afterwards, to wit, on the first Monday of April, in this same term, before the supreme court of the United States, comes the said Cornelius Kanouse, by Andrew S. Garr, his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment therein mentioned to have been given in the court of common pleas for the city and county of New York, was given for the said John M. Martin against the said Cornelius Kanouse; whereas, by the law of the land, the cause ought to have been removed to the circuit court of the United States, for the southern district of New York, and the said court of common pleas had no jurisdiction thereof at the time of the giving of the said judgment. There is also error in this, to wit, that by the record aforesaid it appears that the superior court of the city of New York rendered judgment of affirmance of the said judgment of the said court of common pleas; whereas, by the law of the land, the said superior court ought to have rendered judgment of reversal of the judgment of the court of common pleas. There is also error in this, to wit, that by the record aforesaid it appears that the court of appeals of the State of New York, upon appeal from the said judgment of affirmance given by the said superior court, rendered judgment of dismissal of the said appeal; whereas, by the law of the land, the said court of appeals ought to have rendered judgment of reversal of the said judgment of the said superior court, and to have awarded restitution to the said Cornelius Kanouse of all things which he has lost by occasion of the said respective erroneous judgments of the said court of common pleas and superior court.

And the said Cornelius Kanouse prays that the judgment aforesaid of the said court of appeals, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

A. S. GARR,
Attorney and of counsel for plaintiff in error.

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